NO. 50007-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

GEOFFREY A. PARKER, as an individual and on behalf of his marital community,

Respondent,

vs.

PARKVIEW TRAILS, LLC, a Washington limited liability company,

Appellant,

vs.

EDWARD B. GREER, as an individual and on behalf of his marital community, and PHUONG MINH PARKER, as an individual and on behalf of her marital community,

Third-Party Respondents.

AMENDED REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. REPLY TO RESTATEMENT OF THE CASE 3

III. REPLY TO ARGUMENT 6

A. There is a genuine issue of fact as to when the statute of limitations commenced. 6

1. The statute of limitations did not commence in 2005 or expire in 2011 ..6

2. No clear and unequivocal affirmative action was taken by Parkview to commence the running of the statute of limitations 11

B. The motion for reconsideration should have been granted. 13

1. The newly discovered evidence was not available to Parkview. 13

2. Failure to pay taxes constitutes an event of default authorizing foreclosure. 16

3. The sale of the property to Parker constitutes an additional event of default. 19

C. The court should have authorized additional discovery. 19

1. Parkview's Motion under CR 56(f) should have been granted. 19

2. Parkview's Motion to Compel should have been granted. 24

D. The court should not have dismissed the claims against Greer. 25

IV. CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

4518 S. 256th, LLC v. Karen L. Gibbon, P.S.,
382 P.3d 1, 195 Wash.App. 423 (2016) 12

Bank of New York Mellon v. Stafne,
2016 WL 7118359. 12

Board of Trustees v. Kahle Eng'g Corp.,
43 F.3d 852 (3d Cir.1994) 18

Butler v. Joy,
116 Wn. App. 291 (2003) 20

County of Morris v. Fauver,
707 A.2d 958, 153 N.J. 80 (1998) 18

Edmundson v. Bank of Am.,
194 Wn. App. 920, 378 P.3d 272 (2016) 11, 18

Glassmaker v. Ricard,
23 Wash.App. 35, 593 P.2d 179 (1979) 12

Herzog v. Herzog,
23 Wn.2d 382, 161 P.2d 142 (1945) 18

Kiamichi Elec. Cooperative v. Underwood,
842 P.2d 358 (Okla.Ct.App.1992) 18

Malnar v. Carlson,
128 Wn.2d 521, 910 P.2d 455 (1996) 6

Reed v. Allstate Ins. Co.,
No. C11-0866JLR, 2012 WL 527422 23

Retired Pub. Employees Council of Washington v. State Dep't of Ret. Sys.,
117 Wn. App. 1036 (2003) 6

Rouse v. U.S. Dep't of State,
567 F.3d 408 (9th Cir. 2009) 22

Taylor v. Puget Sound Power & Light Co.,
64 Wn.2d 534, 392 P.2d 802 (1964) 6

Trotzer v. Vig,
149 Wn. App. 594 (2009)..... 22

Washington Federal v. Azure Chelan LLC,
195 Wn. App. 644 (2016)..... 11

Weinberg v. Naher,
51 Wash. 591, 594 (1909) 12

I. INTRODUCTION

Geoffrey A. Parker ("Parker") and Edward B. Greer ("Greer") continue in this appeal with the same tactics and the same theme which they presented during the Superior Court proceedings: (1) they misstate the facts and procedural history of this case; and (2) they attempt to divert the court's attention from the actual contract provisions that control events of default. For example, Parker misstates that Parkview did not timely send discovery requests prior to Parker filing the motion for summary judgment. Contrary to that misrepresentation, Parkview did send discovery requests prior to the filing of the motion for summary judgment. CP 95 ¶2; CP 98-108.

As another example, Parker states in parts of his amended brief that "no discovery requests to Mr. Greer were ever issued." (Parker Amended Brief, p. 44). In other parts of his amended brief, Parker concedes that Parkview issued discovery requests to Greer. (Parker Amended Brief, p. 45, fn 54). Greer misrepresents the facts by stating that "Greer was never served with discovery requests," while in other places stating that "Parkview Trails never served discovery requests on Greer prior to Summary Judgment." (Greer Amended Brief, pp. 24 and 2). Parker and Greer make these misstatements even though Parker's counsel clearly reviewed and consulted with Greer's counsel regarding the discovery requests that Parkview issued to Greer on November 9, 2016, which was well prior to the entry of summary judgment by the Superior Court on December 16, 2016. CP 230. These continued

misrepresentations to the court are unacceptable. Additionally, Parker and Greer continue to intentionally mischaracterize default provisions and remedies under the Agreement and Trust Deed.

This matter involves a unique contract with atypical default provisions. Based on the express terms of the Agreement, the event of default under the Agreement did not occur in 2005 as Respondents contend, which means that the statute of limitations did not expire in 2011. In fact, Parker submitted evidence -- a declaration from Greer in conjunction with the motion for summary judgment in which Greer asserts that he met all of his obligations under the Agreement -- which obviously raises a genuine issue of fact as to when the statute of limitations did commence. CP 55-56. If Greer did not breach, then the statute of limitations could not have commenced to run. Thus, the evidence presented by Parker in the declaration of Greer quite obviously contradicts their argument that the statute of limitations has run. While Parker contends he asked the court to assume for purposes of the summary judgment that a breach occurred, he cannot contradict the facts that he submits in support of his own motion for summary judgment. That alone should have prevented the Court from granting summary judgment.

Additionally, Greer defaulted under the terms of the Trust Deed when he ceased paying property taxes in 2010, during which time Parkview was continuing to incur costs and expenses associated with obtaining final Consents for the Property or re-engineering to obviate the need for Consents. Greer additionally defaulted in 2014 when he sold the

Property to Parker without notice to or consent from Parkview. Oddly, Parker and Greer argue that this sale cured the property tax defaults while failing to acknowledge that the sale itself without Parkview's knowledge or consent resulted in an additional event of default.

The Superior Court ignored the default provision of the Agreement. The pertinent events of default occurred within six (6) years of Parkview asserting its breach of contract and foreclosure claims. Moreover, even if the statute of limitations did commence in 2005, the statute of limitations had not yet run when Greer defaulted in 2010 by failing to pay property taxes, which reset the statute of limitations and reset each subsequent year in which Greer failed to timely pay property taxes. The final default associated with the Trust Deed then occurred in 2014 when Greer sold the property to Parker without Parkview's knowledge or consent.

Last, the Superior Court erred when it denied Parkview its right to complete and conduct discovery. Parkview did not delay in seeking discovery and the initial evidence it did obtain and the evidence it seeks supports its affirmative defenses which operate to bar Parker from quieting title.

The Superior Court should not have granted summary judgment in favor of Parker or dismissed the claims asserted against Greer. The Court should reverse and remand this proceeding to allow Parkview to pursue its rights under the Agreement and Trust Deed.

II. REPLY TO RESTATEMENT OF THE CASE

A. Parker's restatement of the issues under section A misrepresents two material facts. First, in 2005 Parkview did not have knowledge of all facts needed to apply to the court for relief because the Agreement specifically requires Parkview to incur all costs and expenses to obtain all "final Consents" or complete re-engineering to obviate the need for Consents (the "Consents Process") before issuing an accounting to Greer, which would be by definition the final accounting. The final consents were not obtained at that time (and have actually never been obtained). CP 111, ¶7. Second, Parkview did not demand payment from Greer in 2005. CP 111-112, ¶¶8-10. Parkview responded to a letter from Greer's attorney. CP 111, ¶8. In fact, Parkview had no reason to send the letter in 2005 but for the need to respond to Greer's requests. *Id*. Likewise, Greer mischaracterizes Parkview's response as a clear and unequivocal action to demand payment from Greer, when in fact the letter provided the "to date" accounting that was specifically requested by Greer. CP 66.

B. Parker and Greer also misinform the court regarding the newly discovered evidence. This evidence was not in fact available throughout the litigation. The Clark County records would have indicated that no property taxes were due because the taxes were paid when the Property was sold to Greer in 2014 without notice to Parkview. The payment of the taxes in the closing of the sale to Parker did not cure defaults as Parker and Greer contend. It simply changed the events of default from a breach of Greer's obligation to pay property taxes to a breach associated with an unauthorized transfer of the Property. CP 45,

¶3.7. Each of these events of default occurred within six (6) years of Parkview pursuing its claims.

C. Parker also intentionally misrepresents facts associated with discovery (Parker Amended Brief, pp. 15-16 with no citation to the CP). First, Parker contends that Parkview did not seek discovery from Parker prior to his filing of the motion for summary judgment. That is untrue. Parkview sent discovery requests prior to Parker filing the motion for summary judgment. CP 95 ¶2; CP 98-108.

Second, Parker and Greer both assert that Parkview never sought discovery from Greer, while also asserting that Parkview never sought discovery from Greer prior to Summary Judgment. There is no explanation for these continued misstatements and the procedural history must be accurately presented to the court. Parkview issued discovery requests to Greer on November 8, 2016 shortly after he filed an answer in the case and prior to summary judgment being entered on December 16, 2016. CP 230. (time records showing that Parker's counsel reviewed Parkview's discovery requests to Greer with Greer's counsel on November 9, 2016).

Last, Parkview identifies specific legal authority that supports its affirmative defenses which would bar Parker from asserting that the statute of limitations ran. The discovery sought from Parker and Greer would support Parkview's affirmative defenses and additionally establish that Greer was aware of the costs and expenses being incurred on a yearly basis, which confirms that the 2005 response from Parkview was not a

demand associated with a breach. For these same reasons, the Superior Court erred in both failing to rule on and grant the motion for reconsideration and failing to compel production of documents from Parker while continuing the summary judgment hearing.

III. REPLY TO ARGUMENT

A. There is a genuine issue of fact as to when the statute of limitations commenced.

1. The statute of limitations did not commence in 2005 or expire in 2011.

The Parties agree pursuant to Washington law that the statute of limitations shall commence when the cause of action accrues; yet an action only accrues when a party has the right to apply to the court for relief. *Retired Pub. Employees Council of Washington v. State Dep't of Ret. Sys.*, 117 Wn. App. 1036 (2003). In other words, the statute of limitations begins to run when the plaintiff has a right to seek recovery in the courts when "every element of an action is susceptible of proof, including the occurrence of actual loss or damage." *Malnar v. Carlson*, 128 Wn.2d 521, 529, 910 P.2d 455 (1996).[1]

Here, Parker and Greer both allege that the Agreement did not

[1] Parker cites *Taylor v. Puget Sound Power & Light Co*., 64 Wn.2d 534, 392 P.2d 802 (1964) in support of his position that the statute of limitations is not postponed even if the "actual or substantial damages did not occur until a later date." Parker's reliance on *Taylor* is misplaced based on the default provision in the Agreement. The Agreement expressly requires that Parkview account to Greer for all of the final fees and costs before Greer can default under the Agreement based on his failure to timely pay the amount due. Therefore, this Agreement specifically requires that all damages be known before Parkview has a right to seek recovery in court.

require a final accounting to be presented to Greer before an event of default is triggered. Parker and Greer even quote portions of the Agreement to support this allegation. However, neither Parker nor Greer quote the complete provisions that relate to this specific event of default. The Agreement contains a defined event of default, which must occur before a claim could be pursued against Greer. CP 122-123, ¶ 1B and 2. There is no dispute that Parkview notified Greer of his failure to abide by his initial performance obligations in the Agreement, but that failure was not the defined event of default under the Agreement. Rather, based on the express terms of the Agreement, Greer's failure to comply with his performance obligations triggered Parkview's authorization to incur costs and fees for the Consents Process. CP 122, ¶1B and ¶2. Pursuant to the terms of the Agreement, Greer can only be held in default after Parkview obtained the "final Consents" and provided an accounting of all costs and fees associated with the "final Consents", or after Parkview re-engineered the improvements to obviate the need for Consents and provide an accounting which Greer failed to timely pay. CP 122, ¶1B and ¶2. Only at that point in time can the statute of limitations commence.

In fact, the Agreement repeatedly references the requirement that Parkview obtain the "final Consents" (¶1B) or conduct all re-engineering costs to obviate the need for Consents (¶2) before Parkview accounts to Greer for the costs and fees incurred in obtaining such Consents or re-engineering. Only when the accounting associated with completing the Consents Process is provided and Greer fails to timely pay is the event of

default, as defined in the Agreement, triggered, which then allows Parkview to pursue its default remedies. CP 122, ¶1B and ¶2. This accounting by definition is the final accounting that Parker and Greer insist that the court ignore.

There is only one portion of the Agreement that specifically defines an event of default. After the final accounting of all costs and expenses for completion of the Consents Process are known, the Agreement states: "[i]f Greer fails to make such payment, Greer shall be in default of this agreement and Columbia Rim may pursue its remedies under the Lot 1 Deed of Trust." CP 122, ¶1B and CP 123, ¶2. (emphasis added). No other provision in the Agreement authorizes Parkview to declare an event of default or otherwise exercise its remedies under the Trust Deed.

The 2005 response letter to Greer's attorney was not the final accounting required by or contemplated by the Agreement because the Consents Process was not complete. Parkview presented evidence that the Consents Process was never fully completed and there could be additional costs/fees incurred based on reviews by the USACE. CP 111, ¶7. Parkview certainly did not believe so or it would not have continued incurring expenses and issuing yearly billing summaries to Greer setting forth the costs and expenses that continued to accrue. The evidence presented substantiates this fact. As indicated, on August 25, 2005, Greer's counsel sent a letter to Parkview requesting a release of the Trust

Deed and the balance of a holdback net of costs incurred for "environmental costs." CP 139. Greer's counsel specifically asked for "documentation of these costs." *Id*. Parkview responded to that request with the letter dated September 30, 2005, which addressed the questions raised by Greer's counsel and provided costs and fees incurred "so far" and "to date" – as requested. CP 66-67.

Parkview's letter did not provide a final accounting of the costs and fees associated with completion of the Consents Process (because it couldn't – because the Consents Process was never fully completed). *Id*. Rather, it stated that Parkview still had not completed obtaining the consents or conducting all final work. *Id.* The letter additionally requested an explanation of the status of the Consents from Greer and whether any progress had been achieved in obtaining the mitigation requirements and associated approvals with a request for supporting documentation and the status of wetland mitigation and permits. CP 66. Although an offer was made to release the Trust Deed if total costs to date were paid, Parkview did not agree to waive Greer's ongoing and accruing obligations under the Agreement nor did it provide the accounting after the Consents Process required by the Agreement. CP 67. As indicated, the evidence in the record establishes that costs and fees continued to be incurred through at least October 30, 2010 with yearly billing summaries issued to Greer through March 31, 2016. CP 112, ¶10; CP 142-152.

The Superior Court erred in failing to properly interpret the actual

default provision of the Agreement, which was directly negotiated by Parkview and Greer. The final accounting from Parkview was issued on March 31, 2016 and included costs and fees accrued on a yearly basis through October 2010. Consequently, the earliest that the final accounting could be deemed rendered is December of 2010.

Additionally, Parker and Greer by their own submissions have raised a genuine issue of material fact regarding whether Greer initially failed to perform his obligations under the Agreement triggering Parkview's right to obtain the Consents and incur costs and fees. As indicated, in support of the Motion for Summary Judgment, Parker submitted a declaration executed by Greer in which Greer testifies that he complied with the terms of the Agreement and "met [his] obligation under [the Agreement]." CP 55, ¶7. Thus, in accordance with Parker's own arguments, the statute of limitations could not have commenced to run because it submitted evidence that no breach occurred. *Id*. Parker asks this appellate court to ignore the evidence it presented.

As additionally discussed, the evidence obtained through discovery from FATCO indicates that Greer defaulted under the terms of the Trust Deed by failing pay property taxes due from 2010 through 2013. Greer then again defaulted in 2014 when he sold the property to Parker without the consent of Parkview. Based on all of these facts, the Superior Court should have at a minimum found that there is a genuine issue of material fact as to if and when the default occurred under the Agreement and Trust Deed commencing the statute of limitations.

2. No clear and unequivocal affirmative action was taken by Parkview to commence the running of the statute of limitations.

As explained in Parkview's brief, the statute of limitations begins to run when a party is entitled to enforce the entire obligation imposed. *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 930, 378 P.3d 272, 279 (2016). This can only occur when the obligation or note naturally matures or when the party accelerates performance. *Id*.; *Washington Federal v. Azure Chelan LLC*, 195 Wn. App. 644, 663 (2016). There is absolutely no evidence in the record that Parkview elected to accelerate the obligations due under the Agreement.

Parker seems to argue that the case law regarding acceleration in this context can only apply to a note as opposed to a contractual obligation to pay in an agreement that is not a typical note. (Parker Brief, p. 30). Parker asserts that the Trust Deed did not secure an obligation of Greer to pay money because "Mr. Greer did not borrow money." *Id*. That is a distinction without a difference. The Agreement specifically provided that the Trust Deed secured "Greer's obligation to reimburse [Parkview]… up to an amount of $260,000 under the terms set forth below, as well as secure Greer's obligations under section 3 of Addendum B [involving additional costs to be paid]." Those reimbursements are virtually identical to a note obligation, contrary to Parker's assertions. In turn, the Trust Deed refers to the obligation to reimburse Parkview as the "Note." CR 129, ¶¶1, 2 and 2.1. Such obligations to reimburse could naturally mature or accelerate. Thus, the case law requiring a clear and unequivocal

affirmative action to accelerate performance is applicable.

Pursuant to Washington law, Parkview must have taken affirmative action with clear and unequivocal intent to accelerate the obligations owed under the Agreement. *Weinberg v. Naher,* 51 Wash. 591, 594 (1909). In other words, there must be some affirmative action by which Parkview informed Greer that Parkview intended to declare the whole obligation due. *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 382 P.3d 1, 6, 195 Wash.App. 423, 435 (2016) *citing Glassmaker v. Ricard*, 23 Wash.App. 35, 37, 593 P.2d 179 (1979). Under Washington law, a statement of potential future action does not constitute the affirmative action required to accelerate a debt. *Id*. Even a specific notice of intent to accelerate has been deemed insufficient for purposes of accelerating obligations secured by a Deed of Trust. *See Bank of New York Mellon v. Stafne*, 2016 WL 7118359.

The September 30, 2005, letter from Parkview to Greer's counsel does not in any manner clearly or unequivocally indicate, by some affirmative action, that the option to accelerate had been exercised. The letter was only sent in response to the letter from Greer's counsel. CP 139; CP 66-67. The letter requests specific information on Greer's performance of obligations under the Agreement. CP 66. The letter additionally provides Greer's counsel, as requested, with cost and expenses incurred "so far" and "to date". *Id.* Parkview outlined what obligations remained associated with the outstanding Consents and clearly indicated that costs and expenses continued to accrue. It is disingenuous for Parker and Greer

to label the September 30, 2005 letter a demand for accelerated amounts due when the letter was provided in direct response to requests made by Greer's counsel.

B. The motion for reconsideration should have been granted.

1. <u>The newly discovered evidence was not available to Parkview</u>.

An order may be vacated and reconsideration granted if specific cause is found to materially affect the substantial rights of a party. Pursuant to CR 59(a)(4) grounds include "newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." Parker and Greer first contend that Parkview did not act with reasonable diligence in seeking this discovery. In support of this argument, Parker materially misrepresents the procedural history of this case and states that Parkview only issued its first discovery requests to Parker "[a]fter Mr. Parker had filed for summary judgment, and while Mr. Parker's summary judgment motion was pending."

Contrary to that assertion, Parkview sent its discovery requests to Parker prior to the date the summary judgment motion was filed. CP 95, ¶2; CP 72. Moreover, both Parker and Greer erroneously state that Parkview never sought discovery from Greer while also asserting that Parkview sought discovery from Greer after summary judgment was granted. (Parker Amended Brief, pp. 44 and 45, fn 54) (Greer Amended

Brief pp. 2, 21-22, 24). Neither assertion is accurate. After Parker moved for summary judgment, Parkview moved for an order of default against Greer and the default hearing was scheduled for October 14, 2017 – the same day as Parker's Summary Judgment hearing. On October 12, 2017, Greer filed an answer. The record reflects that Parkview intended to serve discovery on Greer if Greer filed an answer prior to the default hearings. CP 96.

The timing of Greer's answer provided no time for Parkview to conduct discovery prior to the Summary Judgment hearing unless the court granted a continuance as requested by Parkview. The court denied the request for a continuance. As a result Parkview did not have an opportunity to conduct necessary discovery on Greer - or on Parker based on the court's ruling and both Parker's and Greer's complete refusal to respond to Parkview's discovery requests even though summary judgment had not been entered when the responses to the discovery requests were due.

Moreover, Parkview, contrary to Greer's statements, did in fact serve discovery requests on Greer a month prior to the summary judgment being entered on December 16, 2016. Parker's and Greer's assertions simply misstate the facts. Their attempts to "correct" those misstatements with their amended briefs continue to challenge the integrity of the record by insinuating that summary judgment had been entered and Greer had been dismissed prior to service of the discovery requests upon Greer when that simply was not the case. Despite the misstatements throughout

Respondents' briefs, Parkview timely sought discovery prior to Parker moving for summary judgment and timely sought discovery from Greer after he finally filed an answer. Parkview exercised reasonable diligence in doing so and did not delay. Parkview believed that Parker would provide the discovery responses in good faith. When Parker refused to comply with the pending discovery requests, Parkview was then forced to subpoena records from the title company which, once received, confirmed that relevant evidence exists that supports both Parkview's claims and affirmative defenses.

Parker and Greer additionally argue that the information discovered by Parkview could have easily been obtained from a public records search. First, there is nothing in the record that supports this assertion by Parker and Greer. Parker and Greer simply claim that Parkview could have obtained information showing Greer's property tax defaults from Clark County Public Records. Second, the parties acknowledge that the property taxes were paid when the property was sold to Parker in 2014. Therefore, a search of the Clark County Public Records would not list unpaid property taxes during the pendency of the lawsuit. Parkview absolutely required this specific document production from Parker and FATCO to discover the prior property tax defaults by Greer which either triggered an event of default commencing the statute of limitations or reset the statute of limitations even if it commenced in 2005, which Parkview continues to contest.

2. <u>Failure to pay taxes constitutes an event of default</u>

authorizing foreclosure.

As described above and throughout Parkview's brief, Parkview continued to incur costs and expenses to attempt to complete the Consents Process through at least October 2010 and issued statements to Greer for "Greer Parkview Trail Obligations" from 2006 to 2016 which listed the then-existing costs and fees associated with the consents, approvals and mitigation efforts. CP 140-152. Therefore, through and including October 2010, Parkview was still incurring costs and expenses associated with the final Consents. *Id*. As a result, the obligations due under the Agreement and secured by the Trust Deed had not expired by the time Parkview asserted its claims against Greer in 2016. As discussed above, during the lawsuit Parkview learned through the documents produced by FATCO that Greer failed to pay property taxes due from 2010 through 2013 resulting in additional events of default.

Parker asserts that Greer's failure to pay property taxes did not result in an event of default that authorized Parkview to foreclose on the Trust Deed. Parker specifically states "under the terms of the Deed of Trust, a missed tax payment did not give Parkview Trails the right to foreclose." Parker goes on to state that Parkview Trails only had a right to "pay the taxes on Mr. Greer's behalf." These statements are false and contradict the terms of the Trust Deed.

To be clear, the Trust Deed expressly provides Parkview with the right to foreclose on the property due to events of default associated with the failure to pay taxes. Specifically, section 3.5 of the Warranties and

Covenants of Grantor under the Trust Deed states: "Grantor will pay not later than when due all taxes… on the Property…" Section 4.1(b) of Trust Deed states that it shall be an event of default when "Grantor shall default in the performance of any covenant or agreement contained in the Purchase Agreement, this Deed of Trust, or any other agreement securing the obligations in the Purchase Agreement." CP130. As Parker points out, Section 4.2 of the Trust Deed authorizes Parkview to perform if there is an event of default; however, the right to perform is not Parkview's sole remedy as Parker contends. Section 4.3 of the Trust Deed provides the remedies upon an event of default including the failure to pay property taxes. CP 131-133. This section provides that Parkview "may also do any or all of the following, although it shall have no obligation to do any of the following: (b) Bring an action in any court of competent jurisdiction to foreclose this instrument or to enforce any of the covenants hereof." CP 132. Therefore, Parkview absolutely had the right to foreclosure upon Greer's failure to pay his yearly property tax obligations in addition to other remedies.

Both Parker and Greer acknowledge in their briefs that the annual property tax payments constitute "installment payments" due under the Trust Deed "to the local government". Yet, both then argue that the Deed of Trust was not an "installment note." Washington law discusses installment payments, which can include obligations due under a note or other agreement. As explained in Parkview's brief, when "recovery is sought on an obligation payable by installments, the statute of limitations

runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142, 144–45 (1945). This legal theory is not limited to installment notes; rather it has been applied in a variety of situations. *See County of Morris v. Fauver*, 707 A.2d 958, 971, 153 N.J. 80, 108 (1998) (the theory has been used in connection with coupons on county bonds due annually, periodic payments under a divorce settlement, and monthly payments under an equipment lease); *Kiamichi Elec. Cooperative v. Underwood*, 842 P.2d 358 (Okla.Ct.App.1992) (applying the theory to electricity contracts); *Board of Trustees v. Kahle Eng'g Corp.*, 43 F.3d 852, 857 (3d Cir.1994) (applying the theory to pension fund withdrawal liability payments).

In this instance, the statute of limitations accrued and reset for each unpaid tax installment payment from the time it became due. *See Edmundson v. Bank of Am.*, 194 Wn. App. 920, 931, 378 P.3d 272, 278 (2016) (action to foreclose accrued, and six-year limitations period governing action began to run, each month in which borrowers' defaulted on installment note and deed of trust by failing to make monthly payment). As discussed above, even if the court were to find that the statute of limitations initially commenced in 2005 (despite all of the existing genuine issues of material fact) the missed tax installment payments would have reset the statute of limitations because 6 years had not yet run from 2005 when Greer failed to make the tax payment for 2010. Greer failed to make installment payments due for tax years 2010

through tax year 2013. Therefore, the statute of limitations to foreclose on the Trust Deed did not commence earlier than November 1, 2013, which was the date of the last delinquent tax installment payment.

3. The sale of the property to Parker constitutes an additional event of default.

Oddly, Parker and Greer both argue that even if Greer defaulted by failing to pay property taxes, the defaults were cured when the property was sold to Parker. This argument is fundamentally flawed. Neither Parker nor Greer acknowledges that the sale of the property to Parker in 2014 was yet an additional event of default. Section 3.7 of the Trust Deed states: "Grantor will not, without the prior written consent of Beneficiary, sell, transfer or otherwise convey the Deed of Trust, the Property or any interest therein…" CP 130. Therefore, the sale of the property was an immediate event of default under Section 4.1(b) of the Trust Deed, which authorized Parkview to foreclose under Section 4.3(b). CP 131-132. The sale of the Property only reinforced and confirmed Parkview's right to foreclose on the Trust Deed. Parker and Greer fail to address this event of default because they can assert no defense to this breach of the Trust Deed.

C. The court should have authorized additional discovery.

1. Parkview's Motion under CR 56(f) should have been granted.

Parkview met the standard under CR 56(f) for the court to continue the summary judgment hearing based on Parkview's need to obtain

affidavits, take depositions, or conduct discovery. CR 56(f). As set forth in Parkview's brief, "[t]he trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 299 (2003).

Parker and Greer again first argue that Parkview delayed in its attempts to obtain evidence. In asserting their positions, Parker and Greer fail to even mention that Parkview sought discovery prior to Parker moving for summary judgment. CP 95, ¶2; CP 98-108. Instead, they focus of the timing of the subpoena to FATCO which Parkview issued only after Parker refused to comply with the civil rules. As discussed in depth, Parkview timely sought discovery and did not delay. Parkview only requested that the court grant a continuance to complete discovery issued to Parker prior to service of the Motion for Summary Judgment and to obtain discovery from Greer once Greer either filed an answer or was defaulted. Parker classifies this as Parkview "choosing not to seek discovery." In reality, Parkview timely proceeded with discovery to support its affirmative defenses and claims against Greer.

Greer also argues that Parkview had this information from FATCO prior to "oral argument at the Summary Judgment Hearing." Once again, the procedural history is materially misrepresented to the court in an attempt to divert the court's attention from the actual facts. The Summary

Judgment hearing was held on October 14, 2016. Transcript, October 14, 2016. At that time, the Superior Court informed the parties that it would make its ruling in open court on November 2, 2106. *Id.* at p.4, 11.20-25; p.5, 11.1-12. FATCO produced documents on October 31, 2016 – a date obviously after the summary judgment oral argument hearing and a mere three days prior to the court issuing its ruling. CP 190 (¶¶3, 4). Therefore, Parkview did not have the information from FATCO prior to responding to the Motion for Summary Judgment or prior to arguing at the hearing on the Motion for Summary Judgment. Most importantly and as discussed further below, the information from FATCO raised significant additional questions regarding the Property sale which could only be answered by obtaining evidence from Parker and Greer.

Parker and Greer also contend that the evidence Parkview identified would not raise genuine issues of fact. Yet, Parker and Greer do not actually address any of the evidence or issues raised by Parkview. Instead, Parker and Greer make broad unsupported assertions that the evidence sought would not change when the breach allegedly occurred under the Agreement or otherwise support an affirmative defense to the statute of limitations claim.

First, as to Greer, discovery was needed based on Greer asserting that he performed under the Agreement, raising an immediate genuine issue of fact regarding the commencement of the statute of limitations. In addition, the evidence in the record confirms that Parkview issued yearly billing summaries to Greer through 2016 which indicated that costs and

expenses were accruing under the Agreement through and including October 2010. CP 142-152. Therefore, Greer had knowledge that the final accounting had not been demanded in 2005 or otherwise accelerated. Essentially, Greer was on notice that Parkview was still performing under the Agreement to complete the Consents Process. As result, Greer did not breach the Agreement until he failed to pay the accounting or costs incurred once the Consents Process was complete, although the evidence confirms Greer additionally defaulted under the terms of the Trust Deed within six years of Parkview pursuing its claims. The evidence that would have been obtained from Greer would clearly raise a genuine issue of fact regarding the date upon which the actual breach occurred commencing the statute of limitations.

Likewise, discovery from both Parker and Greer would raise additional material issues of fact in support of the affirmative defenses laches, waiver, equitable estoppel and unclean hands which were plead by Parkview. These affirmative defenses may apply to bar a claim based on the statute of limitations. *Rouse v. U.S. Dep't of State*, 567 F.3d 408 (9th Cir. 2009).

Although Parkview raises each of these affirmative defenses, Parker only addresses the affirmative defense of equitable tolling, which allows a claim to proceed when justice requires it, even though it would normally be barred by a statute of limitations. *Trotzer v. Vig*, 149 Wn. App. 594, 606, n.9 (2009). The elements for an equitable tolling defense are typically (1) bad faith, deception, or false assurances by the defendant;

and (2) the exercise of diligence by the plaintiff. *Reed v. Allstate Ins. Co*., No. C11-0866JLR, 2012 WL 527422 citing *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791, 797 (Wash.1998). In addressing this defense, Parker contends that any such evidence would have been available to Parkview because the bad act, i.e. bad faith, deception or false assurance, would have had to have been done to Parkview. This is an overly narrow reading of this affirmative defense.

Parker's bad acts are associated with his dealings with the title company which directly prejudiced Parkview. In 2014, Parker paid Greer $30,000.00 to purchase property, which had a tax assessed value of $391,800.00. Parker paid this reduced price. The title company insured the sale without payment of the Trust Deed. What representations did Greer and/or Parker make to FATCO to induce it to allow the sale to Parker to close without paying the Trust Deed? Parkview was prohibited from conducting discovery at that issue. FATCO (also represented by Parker's counsel) only produced documents asserting that "no notes" existed about that decision, further indicating that it was odd there were no notes. CP 284 (noticing "there are no notes in the file as to the reason it was removed….received a call from them asking questions why he didn't pay off the Deed of Trust at closing").

Discovery is absolutely necessary on these issues because the facts indicate that Parker either purchased the Property at a significantly reduced price <u>subject</u> to the Trust Deed or otherwise made representations or assurances at the time of the purchase which would adversely affect his

ability to now challenge the validity of the Trust Deed (e.g. unclean hands). Had Parker not purchased the Property subject to the Trust Deed or otherwise made such representations, a title company would have contacted Parkview at the time of the initial transfer from Greer to Parkview, which would have allowed Parkview to have addressed the breach associated with the transfer at the time it occurred while also discovering at that time the breaches by Greer associated with his failure to pay property taxes. Therefore, despite Parker's baseless contentions, the evidence sought related to these facts supports an equitable tolling defense.

Parker and Greer fail to address any of the additional affirmative defenses raised by Parkview because they simply cannot articulate why the affirmative defenses would not bar Parker from asserting that the statute of limitations expired. Specifically, as set forth in Parkview's brief the affirmative defenses of waiver and estoppel may act to directly bar reliance on the statute of limitations. Based on the limited evidence provided by FATCO, additional discovery from Parker and Greer would raise genuine issues of fact supporting these affirmative defenses.

2. Parkview's Motion to Compel should have been granted.

Parkview's motion to compel discovery should have been granted for the same reasons discussed above. The affirmative defenses plead by Parkview absolutely serve as a bar to Parker's reliance on the statute of limitations. Once again, both Parker and Greer fail to address these

additional valid defenses in their briefs.

D. The court should not have dismissed the claims against Greer.

The Superior Court's erroneous rulings resulted in a dismissal of Greer from the lawsuit. This too was erroneous. Parker's Motion for Summary Judgment should not have been granted and the order and dismissing Greer should therefore be vacated.

IV. CONCLUSION

Negotiated contract terms, the procedural history of the lawsuit and the plain language of the relevant documents cannot be ignored or overlooked as urged by Parker and Greer or as misrepresented by them. The evidence does not support a finding that the statute of limitations commenced in 2005 or otherwise expired prior to Parkview asserting its claims. Not only did the Superior Court err in finding that the statute of limitations expired, it additionally erred in failing to continue the summary judgment hearing to allow Parkview to complete necessary discovery that would raise yet additional genuine issues of material fact. For the same and similar reasons, the Superior Court erred in failing to rule on and grant Parkview's motion for reconsideration. As a result, the Summary Judgment ruling was also in error in favor of Greer. Therefore, the Court of Appeals should reverse and remand the orders and judgments of the Superior Court as set forth in Parkview's initial brief.

DATED: November 3, 2017.

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PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S AMENDED REPLY BRIEF AND PROOF OF SERVICE** with the State Court Administrator by using the Washington Appellate eFiling system on November 3, 2017.

I further certify that I electronically-served the foregoing **APPELLANT'S AMENDED REPLY BRIEF AND PROOF OF SERVICE** upon the persons listed below by using the Washington Appellate eFiling system on November 3, 2017.

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